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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

No. _____
Lewis County Superior Court No. 11-1-00790-6

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

In re the Personal Restraint of:

TODD DALE PHELPS,

Petitioner.

PERSONAL RESTRAINT PETITION WITH LEGAL ARGUMENT
AND AUTHORITIES

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I.
STATUS OF PETITIONER/PROCEDURAL HISTORY

Todd Dale Phelps seeks relief from the judgment and sentence imposed in Lewis County No. 11-1-00790-6. He is presently incarcerated at the Lewis County Jail, serving the remainder of his 5 year sentence.

II.
STATEMENT OF THE CASE

Todd Phelps was charged with one count of third degree rape and sexual misconduct with a minor. CP 42-45. He filed an appeal. This Court affirmed. *State v. Phelps*, 181 Wn. App. 1034 (2014). He petitioned for review by the State Supreme Court and review was denied. *State v. Phelps*, 181 Wn.2d 1030, 340 P.3d 228 (2015).

As set out in Phelps's opening brief in his appeal, the evidence was conflicting.

Todd Phelps was an assistant coach for the Pe Ell girls' fastpitch softball team, and had been for 17 years (as of 2010). RP 39, 298, 433, 1556. The team's season was in the spring, but there was also a select team that played in tournaments over the summer. RP 37-38, 1290. In the summer of 2010, Phelps took his family and members of the team to various games and tournaments most weekends. One of the players that often traveled with the family was A.A. RP 37-39, 432, 440, 1290-1297.

She was 16 and had a strained relationship with her own parents. RP 38, 41-42, 84-89, 105, 123, 142, 178, 222, 239, 535, 539, 719.

A.A. cut herself, experienced depression, resisted taking her anti-depression medication, lied to her parents frequently, contemplated suicide more than once, and generally preferred the company of the Phelps family. RP 39-41, 49-50, 99-101, 110, 113, 161, 226, 363, 379, 446, 517, 719. She often spent the night with Phelps's daughter Angelina who was two years older and tutored A.A. in math. RP 42, 184, 384, 438, 445, 509, 518.

After that summer season was over, A.A. rarely saw the Phelps family until the start of the school fastpitch season in February of 2011. RP 448. A.A. continued to have a difficult relationship with her family, and once the season started, she confided to Phelps that she had been cutting herself and had considered suicide. In late March, Phelps and A.A. talked in his truck in the parking lot of a church after watching a game. RP 450, 579, 695, 767-768.

Once Phelps learned of A.A.'s challenges, he worked to keep A.A. from self-harm and tried to help her improve her self-esteem. A.A. did not readily discuss her issues with adults, with the exception of Phelps. They developed a relationship that included phone calls and frequent texts, even late into the night. RP 469, 549, 984-1003, 1308. Phelps contacted several people to express his concerns about A.A., including A.A.'s mother, the

head fastpitch coach, the other assistant coach, the pastor at A.A.'s church as well as the pastor's wife, and Phelps's own wife. RP 45-46, 50, 110-112, 188, 202, 205, 214, 217, 230, 245-6, 1298.

The first week of April, A.A. told her pastor's wife that Phelps had kissed her. While stories differed on where, how, and when, school authorities were notified of the allegation. RP 119, 144, 153-154, 218-220, 247, 269, 301, 306, 501, 513-516, 540, 1234, 1464.

While the school's investigation regarding the kiss was ongoing, Phelps met with A.A. and her parents. RP 50-51, 302. The two families agreed that Phelps should not lose his coaching job because he was trying to help A.A. RP 147, 314. The school agreed, and directed Phelps to have no further contact with A.A. via text or phone except as related to his coaching duties. RP 315 -319. Phelps continued to have frequent contact with A.A. despite this directive, and later resigned his coaching job as a result. RP 64, 260-261, 300, 320-323, 984-1003.

In September of 2011, A.A. moved to her aunt's home near Fife. RP 131, 696. After being there a few weeks, she told her aunt (and then her parents) that she had sex with Phelps in July. RP 283, 286.

Beginning in voir dire, and without objection, the prosecutor introduced the concept of "grooming." He discussed it with the entire voir dire panel at length:

MR. HALSTEAD: Now, has anyone here heard in the realm of sexual assault, rape, child molestation, anything like that, has anyone heard of the word grooming? Raise your hand, please.

Number 10, grooming, what does that mean to you?

JUROR NO. 10: Grooming, the context I'm thinking of is grooming of a victim to be assaulted.

MR. HALSTEAD: Okay. Can you elaborate a little bit for me?

JUROR NO. 10: Well, yeah. Spending time with the child or with the -- you know, with the victim, gaining trust of the victim, basically preparing the victim to make the next move.

MR. HALSTEAD: Okay. Did everybody hear that? Anybody not hear it?

Okay. Number 8, you raised your hand. You want to add something to that?

JUROR NO. 8: Not really. I think it's a trust issue. You know, the victim trusts the person. That's how they get started.

MR. HALSTEAD: So it's a trust relationship.

JUROR NO. 8: Right.

MR. HALSTEAD: Until what point?

JUROR NO. 8: Until something happens that they distrust them. Something would have to happen to make -- essentially with a child, you know, because children, they pretty much trust everybody.

MR. HALSTEAD: Okay. Well, how's the trust built? Raise your hand. Number 9?

JUROR NO. 9: Well, could establish a relationship with the family, doesn't have to be just the victim, be the victim's family, just get everybody to trust in you. Said something about a six-year-old before. If a six-year-old said they did this, number 3, nobody would believe them. This perpetrator has gained the trust of the people around the victim.

MR. HALSTEAD: Right. Okay. So is that part of the process, the perpetrator when they're grooming not just the victim but other folks around the victim maybe? Just what you said --

JUROR NO. 9: Well, I suppose it could be. I don't know.

MR. HALSTEAD: Well, how else is trust gained? There were quite a few of you back there raised your hand. Way in the back, 46?

JUROR NO. 46: (Inaudible.)

MR. HALSTEAD: You're going to have to speak up real loud.

JUROR NO. 46: Taking the child out to activities and doing fun things with them, and hanging out with the parents, gain trust.

MR. HALSTEAD: Okay. What about -- number 29, what about victims that are groomed for sexual acts, are they ever isolated, do you know, from other people?

JUROR NO. 29: Possible.

MR. HALSTEAD: Okay. How would that happen? How would that happen?

JUROR NO. 29: I don't know.

MR. HALSTEAD: Number 39?

JUROR NO. 39: One on one.

MR. HALSTEAD: What do you mean one on one?

JUROR NO. 39: Like a person would take the other person one on one somewhere, do stuff with them one on one instead of being in a group or with a whole bunch of people.

MR. HALSTEAD: Okay. Now, but what about isolating them from their other friends? Is that something that...I'm just throwing these out here, I mean, if you're not familiar with any of these. But please speak up if you are.

Number 21, is that a -- if you're grooming someone and you're trying to gain a trust relationship to groom them, is it possible that you're going to try to isolate that victim from the other people that victim trusts in their life?

JUROR NO. 21: Yeah.

MR. HALSTEAD: And how would that happen? Can you think of anything where -- how you going to accomplish that?

JUROR NO. 21: Try to turn their friends against them.

MR. HALSTEAD: Okay. And their family maybe?

JUROR NO. 21: Yes.

MR. HALSTEAD: Or maybe their boyfriend or something like that?

JUROR NO. 21: Yes.

MR. HALSTEAD: Does anyone disagree with that?

Number 30?

JUROR NO. 30: I agree with what he said.

MR. HALSTEAD: Does that make sense to you?

JUROR NO. 30: It makes a lot of sense to me.

MR. HALSTEAD: Number 7, does that make sense to you?

JUROR NO. 7: Yes.

MR. HALSTEAD: Do you agree with that?

JUROR NO. 7: Yes, I do.

4/17/12 RP 113-117.

During trial, the State did not call any expert witnesses. In fact, at one point, the State asked Yvonne Keller, one of Phelps's fellow coaches, about her observations of the relationship between Phelps and A.A.:

Q: Do you know anything about grooming?

MR. BLAIR: Objection; relevance.

THE COURT: That's an issue that is for expert testimony. She is not an expert. She's already stated she's not an expert. So I'm sustaining the objection.

MS. EURICH: Thank you, Your Honor.

4/18/12 RP 211.

Nonetheless, in closing argument, the prosecutor reminded the jury that he had introduced the subject of grooming. He said:

Then we talked about grooming. We talked about the process of grooming. And some people came up with examples of how someone who is grooming is going to be nice. They are going to try to get the trust of someone. They are going to try and isolate that person so that they can do an act against this person who is being groomed. And it's not just the person who is being groomed, but it's other people that are around as well that are being groomed.

4/26/12 RP 40. The prosecutor continued:

What is all this stuff that's going on? What is all this physical contact between a coach and a student athlete? It's grooming; it's okay, every time I touch you, it's okay, it's okay. Eventually, it becomes the norm. The grooming isn't in the open, folks. When people groom, they don't do it so everybody else can see. That's not the way it works. It wouldn't be called grooming. It would be called a crime because he'd be caught all the time.

4/26/12 RP 53-54. The prosecutor continued:

But at this point, he decides to meet with his wife, Mandy, and Mandy's parents. Why? Why now is it so important that they discuss Mandy's issues? Well, guess who is being groomed now? Mandy's been groomed for the last month or so. But guess who is being groomed now? Everybody else. Everybody else because everybody else is now going to learn that, hey, it's not me that's acting inappropriate. It's not me who is the adult here and has a responsibility to make sure that nothing like this happens with a student athlete. It's Mandy. She is the suicidal person.

4/26/12 RP 56.

She gets up, walks to the front of the bus, and turns and steps in the very front seat. And she's got her rear facing the defendant. And what does he do? He leans into the seat, and it's dark out, and he takes his hand and puts it in between her legs. Again, grooming. He already knows she's not going to respond. And they continue to text each other throughout the week.

4/26/12 RP 60. And:

And on the 14th, and you'll see in the records, on the 14th, there are records -- I think I have them on here when I get through here in a second. But Mattie and Mandy meet the defendant at the high school. And it's during that period of time, State would submit to you that the defendant knows that he can trust Mattie. He's beginning to groom her as

well. Maybe not for anything that he was doing with regard

--

MR. BLAIR: I object to that.

MR. HALSTEAD: I haven't finished.

THE COURT: Overruled.

MR. HALSTEAD: I'm not suggesting that he was grooming her for something he did to Mandy. What I am suggesting is he was grooming her just like he was grooming everybody else, that these issues are Mandy's, and he's not a bad guy.

4/26/12 RP 64-65. And further:

And then we hear stories. And this is during this period of time the grooming is going on, all didn't happened in one day, this is over the course of time, we hear that the defendant has told Mandy that Annette doesn't even let him sleep in the bed, their own bed. We hear the story about how she made out with Travis Lusk, which turns out to be true.

4/26/12 RP 67. And further:

Watched her butt in the batting cages, had to wear sweatpants to practice because he would get erections. She was a nine because she didn't have boobs on her back, and he wanted to bite her lip. These are the things that are going on that she's being told and groomed with throughout their contacts.

4/26/12 RP 69. And also:

So let me talk about grooming again. At this point, point of the rape, Mandy is pretty much isolated from her entire family until she eventually is allowed to move with her aunt. Remember the stories about her family, her grandma, her cousin, her aunt. She's told these sex stories by the defendant.

4/26/12 RP 84-85. And:

So I want to talk about the credibility of Mandy. And I'm going to speed this up. I know I'm taking quite a bit of time, but there's a lot information in this case.

I want you to consider Mandy's environment, okay, when she went through all this. She's depressed. She's not getting along with her family at the time. She has low self-esteem. That's not an issue. Nobody disagrees with that. She's a prime candidate for grooming, to be manipulated. And that's exactly what happened in this case.

4/26/12 RP 87. And:

She says Mandy's obsessed with her dad. Maybe that might be true. Maybe she was. But she's being groomed. But that, of course, isn't what we heard from Mark Miller. Mark Miller said it's the other way around. But in any case, it is what it is.

4/26/12 RP 89. And:

So why are we here? We're here because of grooming, we're here because of deceit, concealment, half-truths, misrepresentations. And there's only one adult in this entire case who had control over everything that happened in this case. One person who had the control and the authority to control the flow of information and the people involved. And that's that guy right there.

4/26/12 RP 95. In rebuttal:

MR. HALSTEAD: The physical evidence, there's an easy explanation for that: It was cleaned up. The blood was cleaned up. Just because a drop of blood hits the ground doesn't mean you can come back three months later after it's been vacuumed and walked on and everything else and find blood. It's not going to happen.

The iPod texts deleted, again, by Mandy to protect him. So where are we at? So now we're in a position where Mandy

has to pay because she tried to protect him. Do you know what this is called? It's called grooming. And she was groomed well.

4/26/12 RP 96.

MR. HALSTEAD: Now, this erection issue, this is entertaining to me. Words are different than actual conduct. Is it possible that he is grooming a young woman and telling her that when I watch you bat in catches, I have to wear sweats because I get an erection? Does it mean he actually had one? No. Well, we know he probably did, though.

4/26/12 RP 135. And finally:

As concerned as the defendant was for Mandy, not one time, we haven't heard any information that he ever called CPS, that he ever called law enforcement, nothing. That's how concerned he was. He was grooming everybody else. Remember, he was the one that was putting out the severe information that she was going to commit suicide. Everybody else was familiar with it. And he was the one telling his family, hey, this is a real big deal. Think it was played up quite a bit.

4/26/12 RP 138.

Mr. Halstead also used a PowerPoint presentation in his closing.

See Appendix 1. His slides repeatedly referred to grooming and those facts from the particular case that he deemed to be grooming. Slide number 81, listed 13 instances under the title "**GROOMING.**" Slide 88 repeated that the reason for the trial was "grooming Mandy and others." Slide 34 stated that "grooming" was never out in the open. Slide 52 asserts that Phelps was "grooming" another young woman.

III.
GROUND FOR RELIEF

1. The trial prosecutor committed reversible misconduct when he introduced the concept of “grooming” without evidentiary support and then used this concept in closing argument to both vouch for the credibility of victim and to argue Phelps’s “bad character.”
2. Trial counsel was ineffective when he failed to object to the introduction of the concept of “grooming” and when he failed to object to the prosecutor’s argument about that concept in closing.
3. Appellate counsel was ineffective for failing to argue on direct appeal, that despite the lack of objection by trial counsel, the prosecutor’s conduct in this case was flagrant and ill-intentioned.

IV.
ARGUMENT

A. THE PROSECUTOR COMMITTED FLAGRANT AND ILL-INTENTIONED MISCONDUCT WHEN HE PRESENTED AND ARGUED THE CONCEPT OF GROOMING WITHOUT EVIDENTIARY SUPPORT

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126, *reh’g denied*, 426 U.S. 954, 96 S.Ct. 3182, 49 L.Ed.2d 1194 (1976). Prosecutorial

misconduct may deprive a defendant of his constitutional right to a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673, 677 (2012).

1. Evidence of “grooming” is inadmissible.

The prosecutor knew or should have known that evidence of grooming implying guilt based on the characteristics of known offenders is the sort of testimony deemed unduly prejudicial and therefore inadmissible. *State v. Braham*, 67 Wn. App. 930, 937, 841 P.2d 785, 789-90 (1992), *amended* (Jan. 4, 1993). “[P]rofile testimony that does nothing more than identify a person as a member of a group more likely to commit the charged crime is inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice.” *Id.* at 936. “Perpetrator profile testimony clearly carries with it the implied opinion that the defendant is the sort of person who would engage in the alleged act, and therefore did it in this case too.” *Id.* at 939 n. 6; *see, e.g., State v. Petrich*, 101 Wn.2d 566, 576, 683 P.2d 173 (1984) (witness improperly testified that in “eighty-five to ninety percent of our cases, the child is molested by someone they already know”), *overruled in part by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1998); *State v. Claflin*, 38 Wn. App. 847, 852, 690 P.2d 1186 (1984) (testimony that 43 percent of child molestation cases “were reported” to have been committed by “father figures” inadmissible under ER 403), *review denied*, 103 Wn.2d 1014

(1985); *State v. Maule*, 35 Wn. App. 287, 293, 667 P.2d 96 (1983) (expert improperly testified that “the majority” of child sexual abuse cases involve “a male parent-figure”); *State v. Steward*, 34 Wn. App. 221, 224, 660 P.2d 278 (1983) (expert improperly testified in murder prosecution of a babysitting boyfriend that “serious injuries to children were often inflicted by either live-in or babysitting boyfriends”).

What the prosecutor did here is quite different from the State offering the expert testimony in its case in chief to prove an element of the crime, i.e., that sexual abuse/rape did in fact occur. *See State v. Black*, 109 Wn.2d 336, 351-52, 745 P.2d 12 (1987) (Utter, J. concurring) (noting the importance of this distinction).

2. Even if “grooming” is admissible, such evidence must be presented by an expert.

“Grooming,” if admissible, is a concept that must be supported by expert testimony. *State v. Braham*, supra. *See also, State v. Akins*, 298 Kan. 592, 315 P.3d 868 (2014); *State v. Berosik*, 352 Mont. 16, 23, 214 P.3d 776 (2009); *State v. Sorabella*, 277 Conn. 155, 211-14, 891 A.2d 897, cert. denied, 549 U.S. 821, 127 S.Ct. 131, 166 L.Ed.2d 36 (2006); *Morris v. State*, 361 S.W.3d 649, 659-62 (Tex. Crim. App. 2011); *Jones v. United States*, 990 A.2d 970 (D.C. Cir. 2010).

Moreover, even the experts disagree on the precise factors that go into the concept of grooming. Lucy Berliner, a well-known expert in the field of child sexual abuse, describes the dynamics of the child-offender relationship before the initiation of sexual abuse. These dynamics include three components: 1) "sexualization," where the offender starts off under the guise of "normal behavior" and non-sexual physical contact, but becomes increasingly more sexual and intrusive; 2) "justification," where the offender tells the child that the touching isn't really sexual, perhaps that it is hygienic or educational; and 3) "cooperation," where the offender persuades the child not to tell by threatening some type of harm or bad consequence. *Braham*, 67 Wn. App. at 934 n.4 (Berliner testified in this criminal case, describing the findings of her study "The Process of Victimization," which appeared in the Journal of Child Abuse & Neglect).

Another expert who testified about "grooming" in a criminal trial added that in the process the offender often somehow leads the victim into feeling responsible. Some offenders might ask the child, "Do you mind if I do this?" And the child, who really has no power in the relationship to begin with, doesn't object. And so then, when the sexual molestation follows, the child feels that he or she must have been some kind of partner in this. *State v. Stafford*, 157 Or. App. 445, 449, 972 P.2d 47, 49 (1998), *review denied*, 329 Or. 358, 994 P.2d 125 (1999) (quoting Dr. Michael

Knapp, a licensed clinical psychologist with specialized training in the treatment of offenders).

A prosecutor improperly comments on the evidence when he encourages a jury to render a verdict based upon facts not in evidence. *State v. O'Neal*, 126 Wn. App. 395, 109 P.3d 429 (2005); *State v. Stover*, 67 Wn. App. 228, 230-31, 834 P.2d 671 (1992), *rev. denied*, 120 Wn.2d 1025, 847 P.2d 480 (1993). Here, the prosecutor introduced the concept in voir dire and asked jurors what they thought grooming entailed. But what jurors might commonly think of as “grooming” is irrelevant because grooming is a concept that must be presented by an expert. The trial judge said that very thing in responding to a defense objection during trial. There was no expert testimony regarding grooming in this case. Thus, if some of the jurors’ definitions of grooming were erroneous, there was no testimony to correct the opinions expressed in voir dire.

Worse yet, the prosecutor presented his own definition of “grooming” and argued that grooming under his definition occurred in this case. He did this to explain why there was no physical evidence, why the victim made conflicting statements and why Phelps and his witnesses were not credible. The prosecutor told the jury certain actions taken by Phelps were grooming. But those were connections of his own invention. For example, the prosecutor argued that certain actions taken by Phelps were

intended to “groom” other adults in A.A.’s life. But there is no support in the expert testimony provided in other published cases that the concept of grooming applies to someone other than the victim.

3. The introduction of the concept of grooming and the prosecutor’s questions about grooming were flagrant and ill-intentioned.

Because trial counsel failed to object at trial, the errors he complains of are waived unless he establishes that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *State v. Thorgerson*, 172 Wn.2d 438, 443; 258 P.3d 43 (2011); *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, *Thorgerson*, 172 Wn.2d at 448, a prosecutor must “seek convictions based only on probative evidence and sound reason.” *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74, *review denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968).

Mr. Halstead is an experienced prosecutor. As such, he was surely aware of the decision in *State v. Braham*, *supra*, a Washington case that was published in 1992. Certainly, every prosecutor knows that “profile” or “character” testimony is inadmissible to prove that the defendant is

guilty of the crime. He was also undoubtedly aware that psychological syndromes can only be established by trained experts.

4. The introduction of this inadmissible concept was very prejudicial.

In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *Thorgerson*, 172 Wn.2d at 442. To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. *Id.*; *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

In this case, there was delayed reporting, conflicting reports and little or no forensic evidence. But the State had a record of numerous phone calls between Phelps and A.A. While there may be an argument that the volume of these calls was inappropriate, there was no evidence that the communications between the two was illegal. But, by tying the contacts Phelps had with A.A. to the concept of grooming, he could argue that these contacts were proof of the charged sexual assaults.

Here, the misconduct was so pervasive that it could not have been cured by an instruction. "[T]he cumulative effect of repetitive prejudicial

prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” *In re Glasmann*, 175 Wn.2d at 707; *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

5. The decision in *State v. Akins*, 298 Kan. 592, 315 P.3d 868 (2014), is directly on point.

In *Akins*, the defendant’s four step-children accused him of indecent liberties. The children all testified at trial to various interactions with Akins. Akins presented an expert on children’s “suggestibility” when being questioned about sexual abuse. *Id.* at 597. Akins also testified in his own defense. *Id.* at 873-75. The prosecutor introduced the concept of grooming in her opening statement and returned to that same theme in closing. *Id.* at 877. But, the State never presented an expert on grooming. Akins argued that “reversible error occurred when she made the diagnosis herself.” *Id.* at 878.

The Kansas Supreme Court found that the prosecutor’s arguments constituted “gross and flagrant” misconduct. *Id.* at 609. The Court held that “grooming” evidence requires expert testimony. Thus, the prosecutor argued facts not in evidence and asserted her personal knowledge. The Court noted that it did not matter that the prosecutor did not explicitly purport to make a diagnosis of grooming. Moreover, that Court rejected

the argument that there was no misconduct because the prosecutor never explicitly asserted that grooming is typical in sexual abuse cases. The Court said that because grooming is a well-known phenomenon in sexual abuse cases, the jury could reasonably infer that the prosecutor was referring to the psychological concept of grooming about which there had been no testimony.

Similarly, the introduction of the grooming concept without any supporting evidence and the accompanying misstatement of the law regarding grooming as proof of sexual intent very well could have tipped the jury's decision. And, despite the judge's instruction to disregard statements not supported by the evidence, this generalized instruction was insufficient to cure the comments. The instruction did not specifically address the instances of misconduct and left it for the jurors to determine what comments were supported by evidence and what comments were not.

Akins, 298 Kan. at 614.

B. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE PROSECUTOR'S VOIR DIRE QUESTIONING AND ARGUMENT REGARDING THE CONCEPT OF GROOMING

All criminal defendants have the constitutional right to the effective assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011); *State v. A.N.J.*, 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects defendants' fundamental right to a fair

trial. *Strickland v. Washington*, 466 U.S. 668, 684, 85, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh'g denied*, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984); *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). “[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The right to counsel therefore necessarily includes the right to effective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *A.N.J.*, 168 Wn.2d at 98.

When reviewing a claim that trial counsel was not effective, appellate courts utilize a two-part test announced in *Strickland*. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under *Strickland*, the appellate court must determine (1) was the attorney’s performance below objective standards of reasonable representation, and, if so, (2) did counsel’s deficient performance prejudice the defendant. *Strickland*, 466 U.S. at 687-88; *Thomas*, 109 Wn.2d at 226.

In reviewing the first prong of the *Strickland* test, the appellate courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no legitimate explanation for counsel’s

performance. *Strickland*, 466 U.S. at 689-90; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), *reconsideration denied* (Jan. 18, 2005). An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*. *Hinton v. Alabama*, 134 S.Ct. 1081, 1089, 188 L.Ed.2d 1 (2014). Where an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient. *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 102, 351 P.3d 138, 144 (2015). Appellate courts find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* at 687.

Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. *Strickland*, 466 U.S. at 698.

The failure to object to the prosecutor's questions and arguments cannot be a strategic decision. The evidence regarding grooming is inadmissible under Washington law. It simply cannot be a reasonable strategy to permit the admission of such highly prejudicial evidence. Thus, it appears that trial counsel's failure to object was based upon his ignorance of the law on this point.

C. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT, DESPITE A LACK OF OBJECTION BY TRIAL COUNSEL, THE PROSECUTOR'S CONDUCT WAS FLAGRANT AND ILL-INTENTIONED

Article 1, section 22 (amend. 10) states, in pertinent part: "In criminal prosecutions the accused shall have ... the right to appeal in all cases." In *Evitts v. Lucey*, 469 U.S. 387, 397, 105 S.Ct. 830, 83 L.Ed.2d 821, *reh'g denied*, 470 U.S. 1065, 105 S.Ct. 1783, 84 L.Ed.2d 841 (1985), the United States Supreme Court held that a defendant is entitled to effective assistance of counsel in an "appeal as of right." Thus, on appeal Phelps also had a Sixth Amendment right to the effective assistance of counsel.

The failure of defendant's appellate counsel to raise an obvious issue on appeal is deficient performance. *In re Morris*, 176 Wn.2d 157, 288 P.3d 1140 (2012). Here, the prosecutor's misconduct during trial was pervasive and obvious from the transcripts. And, the issue could be raised on direct appeal even without objection. *See, e.g., State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976, 984, *cert. denied*, 135 S. Ct. 2844 (2015) (The failure to object will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial where the misconduct was egregious).

As argued above, the failure to raise the issue was prejudicial to Phelps's right to a fair trial. Thus, this Court must reverse.

**V.
REQUEST FOR RELIEF**

If the petition is not frivolous and can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits. If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing. The Chief Judge may enter other orders necessary to obtain a prompt determination of the petition on the merits.

RAP 16.11.

Phelps's Petition is not frivolous. Therefore, it must be determined on the merits. As Phelps has argued above, there could be no reasonable strategy for failing to object to the grooming evidence and argument at trial. Thus, the convictions should be reversed and remanded for a new trial.

If, however, the State presents argument or urges this Court to find that some trial or appellate strategy existed and this Court has a question about whether that strategy was reasonable, this Court should refer the matter to the Lewis County Superior Court for a reference hearing where the parties can present evidence regarding counsel's performance. For the foregoing reasons, this Court should reverse Phelps's conviction and sentence and remand for a new trial.

VI.
OATH

After being first duly sworn on oath, I depose and say that: I am
the attorney for petitioner, I have read the petition, know its contents, and
believe the petition is true.

DATED this 19th day of August, 2015.

Respectfully submitted,

Suzanne Lee Elliott
Suzanne Lee Elliott, WSBA #12634
Attorney for Petitioner Todd Dale Phelps

SUBSCRIBED AND SWORN TO before me, the undersigned
notary public, on this 19th day of August, 2015.



Christina Alburas
Notary Public for Washington

My Commission Expires: 11/09/16

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

Mr. William Halstead
Lewis County Prosecutor's Office
345 West Main Street, #2
Chehalis, WA 98532

Mr. Todd Phelps #357684
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

08/19/2015
Date

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APPENDIX 1

**STATE OF
WASHINGTON
V.
TODD PHELPS**

Received & Filed
LEWIS COUNTY, WASH
Superior Court

APR 25 2012

By Kathy A. Brack, Clerk
Deputy

11-1-790-6
80

VOIR DIRE

- WHAT DOES A PREDATOR LOOK LIKE
- WHAT DOES A VICTIM LOOK LIKE
- ONLY ONE WITNESS TO CRIME (ROBBERY)
- MINOR TESTIFYING - CREDIBLE
- TELL YOUR SEXUAL EXPERIENCE
- WHY THEY WOULDN'T REPORT
 - EMBARRASSMENT, GUILT, BLAME, FEAR
 - DIDN'T KNOW IT WAS A CRIME
- GROOMING – NICE, TRUST, ISOLATE

MOSSYROCK GAME

- YVONNE SEES THE PIGGYBACK RIDE
- DEFENDANT COMMENTS YOU ARE LUCKY THERE ARE PEOPLE BEHIND US- TURNS AND GRABS HER BUTT
- DEFENDANT GRABS HER THIGH ONCE THEY ARE ON THE BUS AND SITTING NEXT TO ONE ANOTHER IN FRONT SEAT – YVONNE SEES THEM SIT TOGETHER
- GROOMING – NEVER IN THE OPEN

APRIL 18 MEETING

- ALL OF THE SUDDEN THEY NEED TO REPORT MANDY'S ISSUES TO THE ALDENS WHEN HIS JOB IS ON THE LINE
- WHY WOULD DEFENDANT REVEAL ALL OF MANDY'S SECRETS NOW?
 - HE IS ISOLATING HER EVEN MORE AT THIS POINT TO COVER HIMSELF - GROOMING
 - HER PROBLEMS – GROOMING EVERYONE ELSE
- DEFENDANT AGREES THERE WILL BE NO CONTACT WITH THEIR DAUGHTER OUTSIDE OF SPORTS
- WHY WOULD THE DEFENDANT WANT TO CONTINUE TO HAVE CONTACT WITH MANDY?

APRIL 21, 2011 – CONTINUED CONTACT

- GROOMING CONTINUES
- ISOLATE HER EVEN MORE – STOP TALKING TO COUNSELOR 2 DAYS AFTER HE IS TOLD NOT TO HAVE CONTACT WITH HER
- CONTINUES TO MAKE HER THINK HE IS THE ONLY ONE SHE CAN TALK TO AND TRUST
- GRABS HER FROM BEHIND WHILE ON THE BUS RIDE HOME FROM TOUTLE LAKE GAME - BOUNDARIES
- CONTINUE TO TEXT ONE ANOTHER THROUGHOUT THE WEEK – PHONE RECORDS

JULY 14, 2011

- THE DEFENDANT NOW BELIEVES MATTIE IS HIS FRIEND AND SHE CAN BE TRUSTED – SHE IS BEING GROOMED AS WELL
- TOLD MATTIE HE IS BEING CALLED A “PERVERT”
- MANDY IS CRYING
- DEFENDANT ASKS MATTIE IF THIS IS WEIRD FOR HER – WHY?
- DEFENDANT AND MANDY HUG
- MATTIE TELLS NO ONE
- DEFENDANT BELIEVES HE CAN TRUST MATTIE – THIS IS CONFIRMED LATER ON

GROOMING

- ISOLATED AMANDA FROM HER FAMILY
- STORIES ABOUT HER FAMILY – GRANDMA, COUSIN, AUNT
- TOLD SEX STORIES TO HER – TO GET HER TO TRUST HIM
- HAD HER BREAKUP WITH BOYFRIEND
- DON'T TALK TO COUNSELOR
- MET WITH HER PRIVATELY NUMEROUS TIMES
- MADE HER FEEL IMPORTANT (NOT HIS JOB)
- HE WAS THE ONLY ONE SHE COULD TALK TO
- GRABBED HER BUT AT MCDONALD'S
- GRABBED HER THIGH ON BUS
- TEXT MESSAGES (1000s)
- EMAILS TO EACH OTHER
 - "MY LITTLE STAR" FOLDER

WHY ARE WE HERE?

- GROOMING MANDY AND OTHERS
- DECEIT
- CONCEALMENT
- HALF-TRUTHS
- MISREPRESENTATIONS
- ONLY ONE PERSON HAD THE
CONTROL AND AUTHORITY TO START
OR STOP THIS....TODD PHELPS

WHERE IS THE FORENSIC EVIDENCE?

- PHONE TEXTS – DELETED TO PROTECT DEF.
- MAY, JUNE, JULY EMAILS – DELETED TO PROTECT DEF.
- PHYSICAL EVIDENCE – CLEANED UP BY DEFENDANT “OH SHIT”
- IPOD TEXTS – DELETED TO PROTECT THE DEFENDANT
- MANDY SHOULD NOT PAY A FOR PROTECTING THE DEFENDANT - GROOMED